Supplemental Petitioner's Reply Brief

Supreme Court, U.S.
FILED
DEC 23 1982
ALEXANDER L. STEVAS
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No. 81-1271

IN THE
Supreme Court of the United States
OCTOBER TERM, 1982

FALLS CITY INDUSTRIES, INC.,
Petitioner,
v.
VANCO BEVERAGE, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

~~MOTION BY~~ PETITIONER FALLS CITY INDUSTRIES, INC. ~~FOR LEAVE TO FILE~~ REPLY TO SUPPLEMENTAL BRIEF AFTER ORAL ARGUMENT AND REPLY TO SUPPLEMENTAL BRIEF AFTER ORAL ARGUMENT

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December 23, 1982

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MOTION BY PETITIONER FALLS CITY INDUSTRIES, INC. FOR LEAVE TO FILE REPLY TO SUPPLEMENTAL BRIEF AFTER ORAL ARGUMENT OF RESPONDENT VANCO BEVERAGE, INC.

Petitioner, Falls City Industries, Inc. ("Falls City"), respectfully moves the Court for leave to file Reply of Petitioner to Supplemental Brief After Oral Argument of Respondent Vanco Beverage, Inc. ("Vanco").

The Court granted the Motion By Respondent Vanco Beverage, Inc. For Leave to File Supplemental Brief After Oral Argument on December 10, 1982, and on that date, accepted Vanco's Supplemental Brief After Oral Argument.

Falls City requests that the Court provide it the opportunity to respond briefly by granting leave to file the accompanying Reply of Petitioner to Supplemental Brief After Oral Argument of Respondent Vanco Beverage, Inc.

Respectfully submitted,

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REPLY OF PETITIONER TO SUPPLEMENTAL BRIEF AFTER ORAL ARGUMENT OF RESPONDENT VANCO BEVERAGE, INC.

Vanco's post-argument supplemental brief,[1] filed more than six weeks after oral argument, does not purport to address the two principal issues briefed and argued in this case. It does not challenge Falls City's demonstration, fully supported by the government amici, that the lower courts' rulings are "inconsistent with the language and purpose of the Section 2(b) defense and . . . totally at odds with the broader purposes of the federal antitrust laws." (Amicus Br. 30). Nor, similarly, does it attempt

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[1] Supplemental Brief After Oral Argument of Respondent Vanco Beverage, Inc. ("Post-Argument Br."). Falls City's main brief will be cited as "Falls City Br.", and the Brief for the United States as Amicus Curiae In Support of Reversal as "Amicus Br.".

to deal with Falls City's contention that the lower courts misapplied *FTC v. Morton Salt Co.*, 334 U.S. 37 (1948), in finding that the Indiana-Kentucky f.o.b. price difference caused injury to competition.

Instead, Vanco's belated post-argument brief exclusively addresses a "straw man" argument; namely, that Evansville and Henderson must be two separate retail beer markets because "an unenforced Indiana law prohibits a consumer from importing more than one quart of beer into Indiana." (Post-Argument Br. 1). In fact, it was never claimed that this consumer-level nonimportation law disposed of the market issue, although it is relevant along with other factors. (*See infra* at 3). There are, moreover, other state nonimportation laws that prohibit the sale of beer by out-of-state *wholesalers*, and thus play an even more pivotal role in defining the relevant geographic markets in the beer industry. Vanco's post-argument brief (1) is completely silent with respect to those laws; (2) disregards entirely undisputed evidence demonstrating that wholesale and retail beer prices in Evansville were different from and not correlated with beer prices in Henderson; and (3) erroneously (and irrelevantly) contends that Falls City's pricing "caused" consumers to violate the Indiana nonimportation law.

1. Vanco cites an Indiana statute that prohibits consumers from importing more than one quart of an alcoholic beverage without a permit (Ind. Code § 7.1-5-4-1, 7.1-5-11-1 (1976); Post-Argument Br. at 2 n.7), but fails to mention the Indiana and Kentucky laws that interdict competition from out-of-state wholesalers (Ind. Code § 7.1-3-3-5 (1979); Ky. Rev. Stat. § 243, 244 (1970)). The latter laws have resulted in the historic beer industry practice of charging different f.o.b. brewery prices to wholesalers in different states (*See* Falls City Br. 3-4), and have two immediate and direct effects on this case: *First*, they preclude *direct* competition between Vanco and the allegedly favored Kentucky wholesalers. As a

result, Vanco was forced to prove that Evansville and Henderson comprise a single *retail* beer market in which the f.o.b. brewery price difference indirectly caused competitive injury. As we have previously shown, it failed to sustain that burden. (Falls City Br. 21-32; Reply Brief for Petitioner 12-16). *Second*, the wholesale level nonimportation laws distinguish this case from *Dean Milk Co. v. FTC*, 395 F.2d 696, 701 (7th Cir. 1968), on which Vanco mistakenly relies. (Post-Argument Br. 12). In *Dean Milk*, there was no prohibition against cross-border selling, and local dairies were free to, and did, in fact, sell "in both cities."[2] Thus, it is simply untrue that Falls City has agreed that the geographic market issue "in this case does not depend upon any or all the state laws of Indiana and Kentucky." (Post-Hearing Br. 2, 4-5).[3]

2. Vanco argues at length that the fact that it is "technically illegal" for consumers to import beer into Indiana does not dispose of the market issue (Post-Argument Br. 2-9, 12). As noted, however, Falls City does not claim that Indiana's consumer-level nonimportation law *compels* a finding that Evansville and Henderson are separate retail beer markets. On the other hand, the illegality of transporting beer across state lines is relevant and, along with other economic factors, may explain why beer prices in Evansville are distinct from, and set without regard to, beer prices in Henderson. (*See* Falls City Br. 5-6, 24-26). Vanco completely ignores this undisputed and, we submit, dispositive pricing evidence.

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[2] There was no determination in *Dean Milk* that *consumers* moved across state lines to purchase milk at retail.

[3] Falls City's position is absolutely unchanged from that stated in its letter to Judge Holder of January 19, 1980. It has at all times relied on state laws that "preclude direct competition between Vanco and the Henderson, Kentucky, distributor, Dawson Springs," while agreeing that "Vanco's claim of indirect injury based on alleged competitive effects at the retail level, are not controlled by the . . . state laws of Indiana and Kentucky" (Post-Hearing Br. 4, and Appendix.)

Most significantly, Vanco's owner admitted that Vanco based its wholesale prices on the "established price" of the Evansville distributors of competitive brands,[4] and never adjusted its prices to meet Henderson price competition. (Tr. 722-23). As a result, Vanco's wholesale pricing was correlated in both timing and amount with that of competing Evansville wholesalers (DX 66, 86; *and see* DX 14, J. A. 82-85); there was no such correlation between Vanco's and Dawson Springs' wholesale prices. *Compare* DX 54 and DX 62, Pet. App. 59a-60a. Moreover, while Vanco cites the testimony of a Henderson retailer regarding *liquor* prices (Post-Argument Br. 6), it fails to point out that this same witness testified unequivocally that he did not consider Evansville prices in setting his *beer* prices (DX 215, pp. 10-11, Tr. 799-801, 815). In fact, there is no evidence that *any* wholesaler or retailer, in Evansville or Henderson, ever took cross-border beer prices into account in setting its own prices.

Under well-settled principles, the existence of different and uncorrelated price structures defeats Vanco's claim that there was a unitary Henderson-Evansville retail beer market. As Professors Areeda and Turner have stated, even where there are some "inter-area sales, separate markets are indicated for a given product where its price in separate areas differs and where price movements are relatively uncorrelated." II Areeda & Turner, *Antitrust Law* 355 (1978).[5]

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[4] He testified, in pertinent part, that "our prices to our customers are dependent upon our competition," that "when they settle at a price, and we find out what it is, then we generally go to whatever the established price is," and that his "competition" was the Evansville distributors of competing brands. (DX 66, pp. 85-87).

[5] It has been Falls City's position, concurred in by the government amici, that the lower courts erred as a matter of law in rejecting its meeting competition defense, and that accordingly, this Court could reverse on that ground without having to reach any factual questions. (Falls City Br. 10; Amicus Br. 9, 24; and see Dissent of Judge Swygert, Pet. App. 15a). While the market definition issue has some factual components, the underlying eco-

3. Vanco contends that Falls City "caused" the violation of the Indiana nonimportation law, and points to an episode in the summer of 1974 "when consumer importation of beer became so notorious that it was reported in the newspapers [and] several consumers were arrested by the Indiana excise tax police." (Post-Argument Br. 9). These contentions are at best marginally helpful to Vanco's straw man argument;[6] they do not even purport to advance Vanco's position on the two issues actually presented to this Court. In fact, the summer 1974 episode severely damages Vanco's position on the market definition and causation issues.

There was, undeniably, a flurry of cross-border beer sales in the summer of 1974, but it was not caused by Falls City's pricing. The undisputed evidence shows that in July 1974 Falls City increased its brewery prices by approximately the same amount to both its Indiana and Kentucky distributors (DX 54, DX 62, Pet. App. 59a, 60a); that Vanco increased *its* wholesale prices by more than the brewery increase while Dawson Springs deferred any increase in its wholesale price until September (Id.);[7] that for the one and only time during the

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nomic facts which demonstrate the absence of any pricing interdependence are not in dispute.

[6] Vanco charges Falls City with causing violations of the Indiana nonimportation law on the theory that "Falls City should not be allowed to escape antitrust liability by using as a shield asserted illegality under state law, which illegality was the direct result of its own antitrust violation. (Post-Argument Br. 11). As noted, however, Falls City has not relied upon the consumer level nonimportation law. Vanco presumably cites the summer 1974 incident to show that consumer arrests at that time were controversial and to support its argument that no further such arrests were made. (*Id.* at 9-10). The record is clear, however, that the severe wholesale price imbalance that arose in the summer of 1974 was not repeated thereafter. *Compare* DX 54 and 62, Pet. App. 59a and 60a.

[7] As a result, as we have previously noted, the difference between Vanco's and Dawson Springs' wholesale prices on certain major packages amounted to more than twice the f.o.b. price differential. (Falls City Br. 25 n.13). Moreover, as of July 1974, Dawson

relevant period there was aggressive price advertising by two Henderson beer retailers in the Evansville newspapers (Falls City Br. 25 n.14); and that the incident ended in September, without any concurrent change in the f.o.b. price differential. (Falls City Br. 24-26; DX 15, J. A. 186).

As noted, these undisputed facts severely undermine Vanco's position on the market and causation issues. *First*, if Henderson and Evansville were truly a single market, one would not expect Evansville prices to increase while Henderson prices stayed constant. Yet, a substantial difference persisted for a two-month period during which, concededly, Vanco made no adjustment in its prices. (Tr. 722-23). *Second*, Falls City cannot be said to have caused either the wholesale price imbalance or the low price advertising by two Henderson retailers. These intervening causes break the causal chain between Falls City's f.o.b. pricing and the claimed competitive injury.[8]

To sum up, Vanco's post-argument brief adds nothing to the briefs and oral arguments already presented to this Court. Falls City has never contended that the Indiana law prohibiting consumers from importing liquor controls the geographic market issue; and Vanco's supplemental brief does not address either the wholesale level nonimportation laws or the clear evidence that Indiana beer prices were different from, and not correlated with, beer prices in Kentucky.

For all of the reasons discussed above, as well as in the earlier briefs of Falls City and the government amici,

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Springs' gross profit margin on two major package types was $ .80 per case compared to $1.65 per case for Vanco. A year earlier their gross margins on the same packages had been approximately the same. *Compare* DX 54 and DX 62, Pet. App. 59a and 60a.

[8] As shown in Falls City's main brief, cross-over purchases in the Summer of 1974 had only a temporary and minimal effect. After 1974 Dawson Springs and Vanco lost Falls City sales at virtually the same rate. (Falls City Br. 25 n.15; DX 51, Pet. App. 54a).

we respectfully urge that the judgment of the Court of Appeals should be reversed and the complaint dismissed.

Respectfully submitted,

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December 23, 1982

Docket Sheet

NO. 81-1271-CFX See: 81-2136	TITLE Falls City Industries, Inc., Petitioner v. Vanco Beverage, Inc.

DOCKETED	COURT
Jan. 7, 1982	United States Court of Appeals for the Seventh Circuit

DATE	PROCEEDINGS AND ORDERS
	Counsel for Petitioner: Howard Adler, Jr.
	Counsel for Respondent: John T. Cusack
Dec. 18, 1981	Application for an extension of time to file petition for writ of certiorari and order granting same until January 7, 1982 by Stevens, J, on Dec. 22, 1981.
Jan. 7, 1982	Petition for writ of certiorari filed. (Record filed).
Feb. 5, 1982	Brief for the respondent in opposition filed.
Feb. 5, 1982	Brief for the U. S. as amicus curiae filed.
Feb. 10, 1982	DISTRIBUTED. 2-26.
Feb. 20, 1982	Reply brief of respondent to brief of the U. S. as amicus curiae filed. (D).
Feb. 22, 1982	Reply brief for the petitioner filed. (D).
Mar. 1, 1982	Petition for a writ of certiorari is GRANTED limited to Questions 1 and 2 presented by the petition.

Apr. 7, 1982	Order extending time to file the joint appendix and petitioner's brief on the merits until May 14, 1982.
May 13, 1982	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
May 13, 1982	Brief, amicus curiae, for the U. S. in support of reversal filed.
May 14, 1982	Joint appendix filed.
May 14, 1982	Brief for the petitioner filed.
May 24, 1982	The motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument is GRANTED.
June 8, 1982	Order extending time to file the respondent's brief on the merits until July 28, 1982.
July 13, 1982	Application for leave to file respondent's brief on the merits in excess of page limitations, and order granting same by Stevens, J., 7/16/82, not to exceed 70 pages.
July 28, 1982	Brief for the respondent filed.
Aug. 17, 1982	CIRCULATED.
Oct. 5, 1982	Reply brief for the petitioner filed. (D).
Oct. 6, 1982	Supplemental brief for the respondent filed. (D).

(Over)

81-1271

Title

No.

DATE	PROCEEDINGS AND ORDERS
Oct. 13, 1982	ARGUED.
Dec. 3, 1982	Motion by Respondent VANCO Beverage, Inc. for leave to file supplemental brief after oral argument and supplemental brief filed.
Dec. 6, 1982	DISTRIBUTED. 12-10. (Above motion).
Dec. 13, 1982	The motion of respondent for leave to file a supplemental brief after argument is GRANTED.
Dec. 23, 1982	Reply brief of petitioner to motion by respondent VANCO Beverage, Inc. for leave to file supplemental brief after oral argument filed.